Nos. 20832, 20833 and 20834

In the

United States Court of Appeals

For the Ninth Circuit

JACK ROBERSON and WILLIAM RODGERS, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20832
UNITED STATES OF AMERICA, *Appellant,* vs. MERRITT-CHAPMAN & SCOTT CORPORATION, *Appellee.*	No. 20833
MERRITT-CHAPMAN & SCOTT CORPORATION, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20834

Opening Brief of Appellants, Roberson and Rodgers

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(For convenience, the individual parties will be referred to by their last names. Appellants will be referred to as "Roberson" and "Rodgers", respectively, and Appellee, the

United States of America, as "the Government". The transcript of record will be noted "T.R." and the transcript of proceedings "T.P.")

JURISDICTION

This action originated in the United States District Court for the District of Arizona. Jurisdiction was established under 28 U.S.C.A. § 1346(b), § 2674 and §2671. At the end of plaintiffs' case on Saturday, October 22, 1965, the lower court ordered judgment for the defendant the United States Government (T.R. 74). Plaintiffs further appeal from Amended Findings of Fact and Conclusions of Law and Judgment dated the 29th day of November, 1965 (T.R. 52).

Roberson and Rodgers then instituted this appeal pursuant to Rule 73 of the Federal Rules of Civil Procedure (T.R. 58) 28 U.S.C.A., § 1291, which grants to this Court jurisdiction to review the Judgment, Findings of Fact and Conclusions of Law of the lower court.

STATEMENT OF THE CASE

Proceedings in Lower Court.

On July 17, 1964, plaintiffs Roberson and Rodgers filed a complaint for personal injuries against the Government (T.R. 1) pursuant to the provisions of § 1346(b) and § 2674 of Title 28 of the United States Code (Cause Civ.—922 Pct.) in the United States District Court in and for the District of Arizona (Phoenix, District No. 2). The Government filed its answer on October 2, 1964 (T.R. 9). On the 21st day of January 1965, the Government filed a Third Party Complaint (T.R. 13) against Merritt-Chapman & Scott Corporation, third party defendant, alleging in general that if liability for the injuries alleged in plaintiffs' complaint be adjudged against defendant-third party plaintiff then the third party plaintiff would be entitled to full

indemnity from third party defendant. Merritt-Chapman & Scott Corporation, third party defendant, filed its answer to third party complaint on March 12, 1965 (T.R. 18).

On July 21, 1965, the defendant and third party plaintiff, United States of America, moved the court for summary judgment coupled with a motion, notice, and memorandum of law (T.R. 22), basing said motion on the ground that the United States of America had no duty to protect the plaintiffs and that the plaintiffs, by the very nature of their work, should have protected themselves and the defendant Government is bound to afford plaintiffs no protection and further "even though the defendant Government maintained the accident prevention program, this did not create a duty or obligation to care for the plaintiffs". The Government also filed an alternative motion that the defenses raised by third party defendant should be stricken as insufficient on the ground that defendant, Merritt-Chapman & Scott Corporation is liable to the Government both on the theory of implied warranty and on the express indemnity stated in the contract between the United States Government and Merritt-Chapman & Scott (T.R. 22).

After extensive oral argument on the motion for summary judgment, the court ordered that the motion of defendant United States of America for summary judgment *be denied* and further ordered that the United States of America's alternative motion to strike those pleadings of third party defendant designated as additional defenses is granted (T.R. 74).

A pre-trial conference was held on September 16, 1965, and on September 23, 1965, the lower court entered its pretrial order (T.R. 32). On October 21, 1965 the case came on for a non-jury trial, whereupon the plaintiffs presented their case through October 23, 1965. At the conclusion of plaintiffs' evidence, on October 23, 1965, counsel for defend-

ant United States of America moved for judgment in favor of the defendant United States of America. The court rendered an opinion from the bench immediately after defendant's motion, holding in essence that there was no liability on the part of the United States of America under the provisions of the Federal Tort Claims Act for the reason that "there being no duty here on the part of the United States Government, there can be no breach of a duty, and thus no liability, under the provisions of the Federal Tort Claims Act.", and further that there was no liability by the third party defendant to the third party plaintiff, and further ordered that judgment be entered accordingly.

The defendant United States of America on November 3, 1965, lodged its proposed Findings of Fact and Conclusions of Law (T.R. 36). The plaintiffs' Objections to Proposed Findings of Fact and Conclusions of Law were filed on November 12, 1965 and on November 22, 1965 third party defendant Merritt-Chapman & Scott requested modifications of proposed Findings of Fact and Conclusions of Law (T.R. 48).

On November 29, 1965 the Findings of Fact and Conclusions of Law were entered (T.R. 52). On the same day judgment that the complaint herein be dismissed on the merits and that each party bear its own costs was entered (T.R. 56).

On December 6, 1965, a filing of the amended judgment was made (T.R. 57). Plaintiffs Roberson and Rodgers filed their notice of appeal on December 21, 1965 (T.R. 58). Defendant United States of America filed its notice of appeal January 25, 1966 (T.R. 65). The third party defendant filed its Notice of Cross-Appeal on February 1, 1966 (T.R. 66).

SPECIFICATIONS OF ERROR RELIED UPON

1. The Court erred in granting defendant United States Government's Motion to Dismiss Plaintiffs' Complaint for

the reason that the Complaint stated a valid cause of action which was fully supported by all of the relevant and competent evidence before the Court, and there was no evidence contradictory thereto.

2. The Court erred in refusing to consider the evidence most strongly in favor of the plaintiffs for the reason that none of the evidence presented by the plaintiffs was refuted in any respect by the defendants, who presented no evidence whatsoever.

3. The Court erred in refusing to consider that the United States Government did assume and did undertake the entire control and regulation of the safety program on the Glen Canyon Dam for the reason that evidence presented by the plaintiffs shows that the entire safety and inspection program was regulated and controlled solely by the defendant United States Government.

4. The Court erred in refusing to consider that if the United States Government assumed complete control of the safety program, and by doing so increased the dangers and hazards to the plaintiffs, that such a negligent performance created liability for the reasons that this is a true expression of the substantive law of Arizona, which is the law to be applied in this case, and is fully supported by the evidence presented by plaintiffs and entirely unrefuted by the defendants.

5. The Court erred in granting defendant United States Government's Motion to Dismiss plaintiffs' Complaint for the reason that the evidence presented by the plaintiffs clearly shows that the defendant United States Government maintained such control over the employees of the third-party defendant contractor, Merritt-Chapman & Scott, so as to control the method or manner in which they performed their work in relationship to safety so as to be able to directly order said employees to change the method or

manner of working which the United States Government inspector believed to be unsafe, or to cause the machinery used by the employees of the third-party defendant, Merritt-Chapman & Scott to be changed when the United States Government inspector considered it to be defective, and further, that retention of this control was negligently exercised by the defendant United States Government, proximately causing the injuries sustained by the plaintiffs.

6. The Court erred in granting defendant United States Government's Motion to Dismiss plaintiffs' Complaint for the reason that the defendant United States Government interfered with the work being performed by the employees of the third-party defendant contractor Merritt-Chapman & Scott in such manner so as to cause the employees to rely on the defendant United States Government's safety inspection rather than to do their own inspection, and that because of such interference by the defendant United States Government, which was performed in a negligent manner, plaintiffs were proximately injured by such negligence.

7. The Court erred in granting defendant United States Government's Motion to Dismiss plaintiffs' Complaint for the reason that the defendant United States Government caused its premises on which the construction work was being performed to be of such a dangerous condition, of which it had knowledge or should have had knowledge through the exercise of reasonable care, and that the negligence of the defendant United States Government in permitting a dangerous condition to exist on its premises was the proximate cause of plaintiffs' injuries, all which is clearly shown by the evidence presented by the plaintiffs and unrefuted by the defendants.

8. The Court erred in making and entering Conclusion No. 3, to the effect that the defendant United States Government did not have a duty, under the contract, to inspect the

premises under construction, and that because there was no duty owed to plaintiffs by the defendant United States Government, there could be no breach of a duty, and thus no liability under the provisions of the Federal Tort Claims Act, for the reason that the Court refused to consider the evidence which established a voluntary assumption of the duty to inspect by the defendant United States Government, which duty was relied upon by the plaintiffs, and which duty was negligently exercised by the defendant United States Government, thus creating a valid cause of action under the applicable laws of the state of Arizona by the plaintiffs against the defendant United States Government, which law controls in this action.

9. The Court erred in refusing to consider and hold that after the defendant, United States Government, undertook to regulate the safety program on Glen Canyon Dam, that the defendant must perform its "Good Samaritan" task in a careful and proper manner, which it failed to do, but instead performed said task in a negligent manner, for the reason that the "Good Samaritan" doctrine is the law in the state of Arizona, which law is controlling in this action, and that the evidence presented by the plaintiffs, and completely unrefuted by the defendant, United States Government, clearly establishes a cause of action based on the "Good Samaritan" doctrine.

10. The Court erred in refusing to consider that one who gratuitously assumes control and renders services to another is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise such competence and skill as he possesses in performing his duty voluntarily assumed, for the reason that under the law of Arizona, which is the controlling law in this action, such a cause of action exists, and further, that the Court erred in

refusing to allow recovery by the plaintiffs against the defendant Government under this law for the reason that the evidence presented by the plaintiffs, and completely unrefuted by the defendant Government, clearly establishes a cause of action based on said doctrine.

11. The Court erred in refusing to hold that the defendant United States Government, in view of the evidence presented by the plaintiffs, and unrefuted by the defendant, assumed a duty to inspect and control the operation of an inherently dangerous work platform 532 feet above the Colorado River, but negligently performed its duty, although it controlled the safety program and maintained full time safety inspectors and engineers on the job who knew, or should have known, the existing dangers, which duty could not be delegated, and that such negligence was the proximate cause of the injuries sustained by plaintiffs.

12. The Court erred in refusing to consider that the defendant United States Government, as owner of the Glen Canyon Dam, owed a duty to furnish employees of an independent contractor a safe place to work when hazardous and inherently dangerous conditions were present, for the reason that the evidence presented by the plaintiffs, and entirely unrefuted by the defendant, clearly shows that said duty was owed by defendant to plaintiffs, that the work was hazardous and inherently dangerous, and that the defendant was negligent in performing its duty, which was the proximate cause of the injuries sustained by plaintiffs, and that under the law of the state of Arizona, which law is to be applied in the instant action, plaintiffs may recover from defendant for said negligent performance of said task.

13. The Court erred in refusing to admit in evidence the Manual of Accident Prevention In Construction, (Exhibit

No. 15) for the reason that said text showed the standard of care that should have been employed by the defendant; that said text was utilized by the defendant United States Government in its safety program and was the recommended text in establishing safe practices for construction work, and further, under the Arizona law, which is to be applied herein, said documents are admissible for the purposes stated.

14. The Court erred in making and entering Conclusion No. 5, to the effect that plaintiffs, and each of them, as employees of the independent contractor, Merritt-Chapman & Scott Corporation, were within the provisions of the Arizona Workmen's Compensation Law, for the reasons that the Arizona Revised Statutes, § 23-1023 (as amended 1965) expressly provides that an injured workman may take compensation under the Workmen's Compensation Act and also sue for recovery against a third party responsible for his injury, the only pertinent limitation being that in the event of a recovery the employer shall be entitled to be subrogated to or have a lien against such recovery to the extent of his payments to the injured workman, and for the further reason that the plaintiff, and each of them, have complied with said statute, thus being permitted to bring this third party action against defendant United States Government.

15. The Court erred in amending the proposed order for the judgment, and amending its judgment, without finding as a fact, that if it were necessary for the Court to determine the question of contributory negligence of the plaintiffs, and reach a conclusion in this respect, that it would conclude that the plaintiffs were guilty of contributory negligence in working on the jumbo, without the use of safety belts, for the reasons that there was absolutely no evidence presented in plaintiffs' presentation of the evidence that the

failure of the plaintiffs to wear safety belts was negligence, but rather that it was customary, proper, necessary, and safer not to wear same while working on the jumbo, nor was there anything to even attach safety belts to, since the handrails and hook-on rails had been removed and never replaced, and that safety nets had always been used to afford protection and mobility while on the jumbo; further, that this defense is not available under the hazardous occupations statutes of Arizona, A.R.S. §§ 23-805; further, that the proximate cause of the injuries sustained by the plaintiffs was conclusively shown by the evidence to have been the faulty inspection and lack of enforcement of safety requirements by the defendant United States Government, and not the failure of the plaintiffs to wear safety belts while working on the jumbo.

16. The Court erred in making and entering Finding of Fact No. 5 to the effect that the slip of the jumbo was caused either by the improper setting of an anchor pin for the jumbo or by the inadequate strength of the pin, for the reason that the evidence conclusively proves that the overall rigging of the jumbo was faulty, causing the jumbo to slip, rather than merely the improper setting of the anchor pin or the inadequate strength of the pin as being the proximate cause.

17. The Court erred in refusing to admit in evidence plaintiffs' Exhibit No. 10 for identification, to wit: the position description of the United States Government Safety Inspector, Richard M. Blake, for the reason that said Position Description, which is an explanation of the Safety Inspector's duties, expressly showed that the government had assumed the obligation to supervise the inspection of the "unsafe working practices or inadequate construction devices such as unsecure ladders, loose or weak scaffolds and disorderly housekeeping," and which document would

have shown that the defendant, the United States Government, voluntarily, *and actively,* assumed the duty of inspection to discover defective equipment used by the general contractor, negligently exercising such duty, and thus proximately causing the injuries sustained by the plaintiffs, all of which should have been considered with Exhibits 11 and 12 in evidence, which are safety inspector Blake's daily safety activity reports.

18. The Court erred in holding that the United States Government was not liable, which is not justified by the evidence, and is contrary to law and is made and based upon a mistake of the law applicable to the evidence in this cause.

19. The Court erred in entering judgment for the defendants after the conclusion of plaintiffs' case for the reason that the liability of the defendants was clearly shown by the evidence presented by plaintiffs, in view of the applicable Arizona substantive law, which is the controlling law in the instant action, and further, for the reason that the defendants presented no evidence to refute that presented by the plaintiffs.

Facts:

This is an appeal by plaintiffs below, Jack Roberson and William Rodgers, both laboring ironworkers who on April 15, 1964, were severely injured when a four (4) level twenty-two (22) ton moveable work scaffold commonly known as a "jumbo", fell while suspended 532 feet above the Colorado River in the west diversion spillway of the Glen Canyon Dam at Page, Arizona. Some seven years prior to the date of the accident of April 15, 1964, the United States of America, by and through the Bureau of Reclamation, had caused the Glen Canyon Dam to be under construction

upon its premises. The Government, as owner of the premises, contracted with Merritt-Chapman & Scott to build said dam.

At the time of the accident in question the construction upon the Glen Canyon dam was substantially completed. This dam was constructed in excess of 500 feet above the bed of the Colorado River. The Government plans provided that two spillways be constructed within the structure of the dam itself or two concrete line diversion tunnels, one on the left side and the other on the right side of the dam. The tunnels ran from the top of the dam in a down-stream direction and discharged into the river on the down-stream side. Each of the tunnels in question had to be cemented and grouted according to the government specifications.

The tunnel on the left side had been fully completed at the time of the accident in question. The accident and controversy occurred in the performance of the grouting of the tunnel on the right-hand side of the dam. The work on this tunnel had progressed to a point approximately 532 feet above the river at which point the contractor had fabricated for high scale work a platform which is described in the evidence as a "jumbo". This jumbo was the identical equipment which was used to perform similar work on the tunnel on the east spillway of the dam, with the exceptions of the safety railings, safety nets, and toe boards which had been removed and not replaced at the time of the accident.

The jumbo itself was mounted on wheels so that it could travel over the surface of the spillway from point to point as the progress of the work required. The jumbo was propelled in such manner by means of a 6-ton cable drum hoist which was situated on the top side of the dam approximately 30 feet from the mouth of the tunnel. A cable lead-

ing from the drum of the hoist ran down to a single shieve pully which was attached to a bridle cable attached to the jumbo and was then returned to an anchor pin, and was then returned back to it at the top side of the cable and strung through one or more shieves or pulleys which in turn were attached to a dead man located behind the hoist and thence back to an anchor pin inserted into a vertical center wall in the mouth of the tunnel.

This anchor hole was drilled into the concrete with a three (3) inch bit a distance of approximately 24 inches deep. (T.P. 132). The hole itself had an interdiameter slightly in excess of three (3) inches. An anchor pin, which was thirty (30) inches long and one and three-fourths (1¾) inches in diameter, was placed into this hole by hand and there rested by gravity alone. (Plaintiffs' Exhibit 7). No cement was used to grout the pin into the hole, nor was any fastening of any kind or nature otherwise added to the pin to keep it rigid, immovable and stationary. (T.P. 164). In this manner the full weight of the jumbo, being twenty-two (22) tons more or less, was entirely supported by the anchor pin. In addition to the jumbo a man car attached to a separate hoist was also anchored to the same pin.

While the jumbo was in the process of being raised up a couple of inches the pin merely "walked" out of the hole which was some inch and one-quarter in diameter larger than the circumference of the pin. This was caused by stress upon the pin. The anchor pin then bent and the cable slipped off, dropping the jumbo some thirty (30) feet before the hoist above could dig into dirt and stop its descent. (See testimony of plaintiffs' expert structural engineer Norman Pederson T.P. 183-185). At the time of the accident plaintiffs Roberson and Rodgers, along with several other employees of Merritt-Chapman & Scott, were working upon

this movable work scaffold, however, Roberson and Rodgers were working on the lowest level of the jumbo.

The jumbo had moved upwards only a couple of inches when the accident suddenly occurred, quickly dropping out from under Roberson and Rodgers and casting them off (T.P. 48, 49). Rodgers grabbed the bridle cable, which traumatically severed the major portion of his right hand. Roberson, not near the bridle cable, was caused to be thrown down the side of the spillway 532 feet to the bottom of the tunnel, causing him to sustain a paraplegia injury to the lower portion of his body and other severe neurological deficits.

At the time of the accident, the dam was in the final stage of completion since the jumbo had been working from the bottom of the west spillway and was within a few feet of completing the cementing process. At this stage the jumbo contained no "hand rails", "guard rails", "safety nets" or "toeboards". (T.P. 46, 48, 49, 67, 68, 100, 284, 285, 287, 372, 375, 416, 417). These safety features were prescribed by the rules and regulations necessary in order to secure the safety of any person working on this jumbo. The violation of these required safety rules and regulations was in contradiction of:

1. U.S. Department of Interior, Bureau of Reclamation "Safety Requirements for Construction by Contract" (Plaintiffs' Exhibit 5);
2. General Construction Safety Code of the Industrial Commission of Arizona (Plaintiffs' Exhibit 14);
3. The Manual of Accident Prevention in Construction (Plaintiffs' Exhibit 15 for identification).

Prior to the plaintiffs' accident, the jumbo contained guard rails, hook-on rails, toeboards, handrails and safety nets (T.P. 33, 37, 38, 49, 157). It is significant that this jumbo

fell while in the east spillway, throwing another ironworker off; however he was saved from going down the east spillway by a safety net then provided. (T.P. 34). Government inspectors were constantly on the jumbo, approximately six (6) hours per day, (T.P. 11, 12, 34, 35, 160, 360, 361, 370, 371, 419). In addition thereto, the government maintained a chief safety officer who had been in charge of safety on the dam and who made the decisions carrying out safety procedures on the dam (T.P. 109-111). See also the job description of chief safety officer Ruben C. Gaulke, Exhibit 8.

Under chief safety officer Gaulke was his full-time assistant, Dick Blake, whose duties entailed only safety, and who inspected and corrected hazardous situations (T.P. 122-123; see also: daily safety activity reports from March 1, to April 30, 1964; plaintiffs' Exhibits 11 and 12). The general foreman on the dam, Mark Weaver, testified that he was in daily contact with Mr. Blake regarding safety and that if Blake wanted anything corrected that wasn't safe it would be immediately corrected or rejected. (T.P. 8, 11, 12, 14, 15, 24 and 29). Further, safety inspector Blake's "pet peeve" was handrails, which ironically were missing from the jumbo (T.R. 14, 29).

Alex Parker, manager of the accident prevention department of the Industrial Commission of Arizona, recognized the control of the Government regarding the safety on the dam and did not interfere with same (T.R. 330, 331). On cross-examination Mr. Parker pointed out that the safety code of the Arizona Industrial Commission on this type of jumbo required railings 42 inches high, toeboards, and screens or solid sides up to 42 inches (T.P. 328, 334). Numerous witnesses testified that the Government controlled methods of work and implemented the safety program on the dam. (T.R. 14, 15, 34, 35, 42, 51, 53, 372-375,

377, 401, 417). The Government, by and through its inspectors, and for seven years hence, maintained, supervised, and controlled the entire safety program throughout the Glen Canyon Dam which by necessity controlled the method and manner that the work was to be performed.

Merritt-Chapman & Scott, the contractor, had no safety program nor safety engineer (T.P. 24). The only mention of any semblance of safety was that of a "materials expediter", one who goes after materials or "an errand boy to go get parts". (T.P. 12, 20). This employee of the contractor was given six jobs in addition to being a permanent materials man (T.P. 12). This materials man had no safety training and had never on his own initiative instituted safety practices. (T.P. 13). Dwight Johnson, the expediter, didn't even acquire additional duties including *safety* until April 15, 1964, the date of the accident, (T.P. 24, 362) as did witness Guy Lewis, who also was requested to assist the government inspectors on April 16, 1964, after plaintiffs' accident (T.P. 51-52). Complete reliance and security was placed upon the Government by all concerned by virtue of their direction of the mode and method of work.

The evidence adduced, clearly demonstrates that the defendant Government intentionally broadened the scope of safety management officer Gaulke's duties and assumed control over work so as to avert accidents (Exhibit 8).

Prior to the falling of the jumbo in question the Government's employees inspected the rigging and installation of said jumbo; compare the deposition admitted into evidence (T.P. 402) of supervisory government construction engineer Eugene B. Anderson. Anderson's duties included the administration of safety and investigation of accidents (Anderson Depo. pg. 5—line 26). The work elevator had been installed in the west spillway in an unusual and un-

safe fashion by suspending the 22-ton elevator by one cable held in the concrete wall by a 30-inch-long pin, 1¾ inch around, not cemented nor bolted into the wall. This type of rigging should not have been used according to Government engineer Anderson, (Depo., pg. 12—line 13). See also the testimony of structural engineer Pederson, who described this anchor as "not safe" (T.P. 200).

The anchor pin protruded some 8 to 12 inches (T.P. 131) out of the hole. The said pin should not have protruded over 2 inches or it would exceed its yield point, making it an unsafe anchor (structural engineer Pederson, T.P. 200). Pederson further testified that the pin bent 14 inches out of the hole after it had "walked out" on repeated occasions (T.P. 183, 184, 185). Safety inspector Gaulke also testified that the general rigging and weight stresses and strains to be placed on contraptions *were his* responsibility, but that he "didn't recall checking this particular piece of equipment over", (T.P. 134, 135). Plaintiff Rodgers had only worked on the jumbo one day and was not familiar with any of the aspects of how or why the jumbo was anchored, and thought that Government inspectors were watching over the places he was working, since he was primarily a welder (T.R. 281, 313, 316). According to experts witness Pederson, Government employees Anderson and Mullins, and witness Sexton, it was necessary to cement the pin in place.

Testimony from the general foreman and other employees illustrates the impossibility for plaintiffs to wear safety belts since there was no place to attach them. Further that work could not be accomplished, and even if a safety belt was practical one might readily be dragged under the wheels of the jumbo (T.P. 56, 432). Even Government inspectors did not wear safety belts while inspecting on the jumbo (T.P. 17, 56, 304, 361, 432).

Some week or ten days before the accident, Government construction engineer Anderson inspected the pin "looking for unsafe things" (Anderson, Depo., pg. 5) and further Anderson inspected the rigging many times himself (Depo., pg. 19, line 22), and "this type of rigging was a surprise to Anderson because one pin shouldn't have been used" (Depo., pg. 24, line 13), "and if the pin had been cemented or bolted in, it would not have given" (Anderson Depo., pg. 30, line 3). Supervisory engineer Anderson stated "that he would not go down on the jumbo himself because it was "too dangerous". (Depo., pg. 25, line 22).

After Roberson's and Rodger's accident, handrails, toeboards, and other safety devices were immediately installed upon the jumbo, at the direction of the government inspectors (T.P. 66, 67, 362, 365). The Bureau of Reclamation Daily Safety Activity Report (Exhibit 12) for April 17, 1964 denotes an inspection for safety nets on the jumbo as required by the United States Department of the Interior, Bureau of Reclamation, Safety Requirements for Construction by Contract (page 27 of Plaintiffs' Exhibit 5).

Questions Presented:

The questions presented in this appeal are in substance as follows:

1. After the United States Government assumed complete execution and control over the safety program, are they liable for their active negligence, which increased the danger to the plaintiffs?

2. Can liability arise from the negligent performance of a voluntary undertaking to inspect and insure safety?

3. Did the defendant Government have a duty to properly inspect and rectify unsafe conditions after its safety inspectors and engineers had previously enforced safety

and had previously required safe rigging of scaffolds, safety railings and nets, which the absence of increased the danger to plaintiffs?

4. Since the Government had undertaken the execution of the safety program and had enforced same for some seven years prior to the accident, did they have a duty the last few months that the dam was under construction to continue to exercise skill and competence and not to increase dangers to plaintiffs?

5. Did the Government owe a duty to plaintiffs to furnish them a safe place to work when hazardous and inherently dangerous conditions existed which the Government had previously protected them against?

6. Could the plaintiffs have been liable for contributory negligence when:

   a. This defense is not available under the hazardous occupation statutes of Arizona?
   b. It was not practical nor safe to wear safety belts on the work platform?
   c. The proximate cause of the negligence was failure to enforce safety rules and faulty inspection, not lack of safety belts?

With regard to each of these questions, the lower court adopted Findings of Fact and Conclusions of Law adverse to these appellants. The question remains whether such findings and conclusions are supported by any substantial evidence or any legal principles.

ARGUMENT

1. Retention of Control Over the Employees of an Independent Contractor Coupled with Retained Control Over Method and Manner of Work and the Complete Execution and Implementation of a Safety Program Over the Dam Subjects the Government to Liability for Failure to Exercise Retained Control with Due Care.

Strangely enough, the lower court's Findings of Fact favor the position that the Government retained control over the work on the dam. The Government had, and did exercise, the right to shut down the job until corrective measures were taken. (Finding of Fact No. 3). That in fact the Government did exercise this prerogative, and did insist upon strict compliance with the Government's safety program. (Exhibit Nos. 11 and 12—daily safety reports). The Government, by and through its safety officers, either obtained immediate response to their safety orders, or rejected the work. (T.P. 8, 11, 12, 14, 15, 24, 29).

A casual perusal of the testimony and Exhibit No. 8, shows that the Government, by necessity, did execute their own safety program throughout the entire dam to protect the workmen from possible falls and injury. Even the safety officer of the Arizona Industrial Commission recognized this, and evidently so did Merritt-Chapman & Scott, who never had anyone designated, even part time for safety, until plaintiffs' accident, some seven (7) years after the inception of the dam. Retention of control of any part of the work, as in the instant case, necessitates due care in exercising said control.

An examination of the safety management officer's amended job description some twenty (20) months before appellants' accident, readily discloses the Government's intentions regarding control over work on the dam. See plaintiffs' Exhibit No. 8:

POSITION DESCRIPTION * * * *

"New position in lieu of self, Safety Management Officer.

"The dam is now about 500 feet above the river. This great height increases the hazard to workmen from possible falls and injury to workmen below from falling objects. Much work must be done on the upstream and downstream faces of the dam in setting concrete forms and repositioning conduit, pipe and conductor cable. A great amount of transmission line construction is in a very rugged and mountainous area, requiring constant precautions to avoid accidents from falls and exposure to inclement weather. Future installation testing and operation of power generating equipment will greatly increase the hazard of electric shock and exposure to moving machinery. *In recognition of these factors, the safety program of necessity has been broadened to such an extent that proper administration requires the function to be placed at an administrative level with the Safety Officer reporting directly to the Project Construction Engineer. The encumbent has two staff assistants responsible for safety program execution over the dam,* powerplant and Page area and over the several hundred miles of power transmission lines.

"SUPERVISION AND GUIDANCE RECEIVED: The incumbent serves under administrative supervision of the Project Construction Engineer, who specifies scope and objectives of the safety program and periodically reviews work accomplishment for effectiveness and compliance with Bureau, Regional, and Project policies. *Extensive experience in coping with the many and varied hazards confronted in heavy construction of the kind and scope employed by the Bureau on major projects is an essential requirement of this position.* The incumbent has available for reference such guides as Part 365 of Reclamation Instructions; Safety Requirements for Construction by Contract; Federal and

State Statutes pertaining to health, safety and welfare of employees engaged in construction activities; and safety publications distributed by the Bureau of Mines. The Regional Safety Officer, Salt Lake City, is available for consultation concerning application of the Regional Safety Program to project activities.

"REPRESENTATIVE DUTIES: The incumbent serves as a Safety Management Specialist with responsibility for the following:

"1. *Develops and maintains on a current basis a safety program devised to provide constant surveillance of hazardous construction activities and to ascertain that safety rules, regulations and practices are observed by both Bureau and contractor employees.*

"2. Collaborates with management officials of the several contractors in establishing safety programs to comply with Bureau safety requirements for contract construction and State and Federal Codes. Periodically meets with these officials to correct safety deviations by contractors personnel and to assist in revising safety programs to provide for changing conditions resulting from progress of construction.

"3. Calls attention to any of the several contractors to violations or disregard by employees to provisions of contract obligations as specified in the Bureau Handbook, 'Safety Requirements for Construction by Contract'. Insists on compliance to those provisions and the taking of corrective measures to prevent reoccurrence of violations.

"4. Examines engineers' and inspectors' reports of accidents resulting in bodily injury to contractors' employees or damage to equipment to determine whether such accidents were unavoidable or due to disregard of safety rules and regulations. *Analyzes cause of accidents not resulting from violations and recommends to supervisor changes in work procedures or adoption of supplemental safety requirements to prevent reoccurrence.*

"6. The incumbent examines the approved safety program periodically to determine its effectiveness and adequacy in keeping accidents to a minimum. *Recommends such amendments or additional inclusions made necessary by changing field conditions.* Initiates and recommends changes in policy that may be required to meet current requirements and objectives of the safety program as construction progresses." (Emphasis supplied)

The Arizona Supreme Court has adopted the Restatement of the Law of Torts on the doctrine of control, compare *Matsumato v. Arizona Sand and Rock Company,* 80 Ariz. 232, 295 P.2d 850, 853:

"We are of the view that the position of plaintiff is sound. It is stated in Restatement of the Law of Torts, section 414, p. 1120, that:

'One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.'"

In an analogous factual situation the Chief Judge of the Eastern District of Tennessee considered a similar situation and ruled in behalf of the plaintiff which was upheld on appeal. See *Pierce v. United States,* 142 F. Supp. 721, all points affirmed in 235 F.2d 466; compare on page 728-729 of 142 F. Supp.:

"It is true that an employer is not generally liable for the negligence of an independent contractor. However, there is an exception in those cases where, from the nature of the particular work or project, in the natural course of events mischievous consequences can be expected to arise unless means are adopted to pre-

vent it. In such cases the owner-employer is held to be under a non-delegable duty to see that appropriate preventative measures are adopted."

* * * * * * *

"Although much of the inspection work had been delegated by contract to Patchen and Zimmerman, it also appears that the Corps of Engineers had some inspectors in the field who were to see that the electrical work was progressing satisfactorily. And of course by virtue of its own contracts, the government knew that the work to be done would necessitate linemen being in and about both the lines and substations of VOW. It also knew that, unless proper steps were taken to see it was killed, high-voltage power would be on those lines and substations while the work progressed.

"Despite these facts the government took absolutely no steps either to correct the defects in the substation or, failing that, to see that the power was off while the crew of linemen to which plaintiff belonged performed their work upon it.

"In the first instance the government was guilty of negligence in erecting and maintaining the substation in a condition hazardous to workmen. Under the non-delegable duty placed upon it it was also chargeable with the negligence of its independent contractor in failing to kill the power before sending plaintiff upon the pole.

* * * * * * *

"Once the decision was made to construct substations and bring in power, all of the discretion required had already been exercised. Therefore, it became the duty of the government and its agents and employees to exercise due care in carrying out the program decided upon. The complete failure to do so is outside the protection afforded the discretionary functions already exercised and results in liability on the part of the

government. Such is the holding of a distinct line of cases by our federal courts. * * *

* * * * * * *

"Neither can the Court accept the government's contention that plaintiff is barred from recovery because he has failed to show negligence on the part of any employee of the government. The premises were under the control of the government. Under its contracts with the companies doing the rehabilitation work, the contracting officer of the Corps of Engineers had the right to approve the work, settle disputes, authorize changes, etc. The dangerous structure was on government premises and the power was purchased and transmitted by the government to be utilized on the premises."

See the testimony of former grouting supervisor Ben Mullins, now a Government employee:

"Q. Who would tell you to replace it, if the diamond drillers took it down?

A. That would either be up to the Bureau inspector or our own—it would be up to us or the Bureau inspector.

Q. Did you ever have a Bureau inspector instruct you, as the supervisor of this grouting crew, to replace cables or handrails?

A. Yes.

Q. Did you do it?

A. Yes.

Q. Did you ever refuse to do it?

A. No." (T.P. 361-362)

* * * * * * *

"Q. By Mr. Brewer: Did you ever refuse to do anything with respect to safety that any Bureau man told you to correct?

A. No."

* * * * * * *

"Q. By Mr. Brewer: What was the answer?

A. Not to my knowledge. Anything that we were told to do to make this safe, or when the inspectors said something, we went along with him and done it.

Q. You hopped to it, didn't you?

A. Yes." (T.P. 366)

See also *Schmid v. United States,* C.C.A 7 (1959) 273 F.2d 172, 173-174, 176-177:

"The scaffolding in question had been erected at this site on the morning of the day prior to the injury which occurred in the late afternoon of September 20, 1955. While the government retained general supervision of the construction project, it reserved no degree of control over the details of the performance of the Construction Company under the contract. A government inspector made periodic visits and had been at the site of the accident about 8:00 o'clock in the morning of the day of the injury."

* * * * * * *

"The record supports a finding that the United States knew or, in the exercise of reasonable care, could have known that the scaffold on which Schmid was working was in a dangerous condition in that some of the floor boards lacked cleats, and it had less than the customary braces. The scaffold had been erected about one and a half days prior to the accident. A government agent was present at the site the morning of the day of the injury. The government, as owner, had the duty under the Illinois Scaffold Act, to see that the Scaffold complied with the Act. Its agents failed to perform that duty. A private person would be liable under these circumstances. *It is immaterial that the independent contractor might also be liable. The government's liability does not rest on the act or omission of the independent contractor but is based on its own failure to comply with the requirements of the Scaffold Act as owner of the premises.*" [Emphasis supplied]

The degree of work control retention does not have to be absolute. See the reporter's notes, *Restatement of the Law of Torts Second* § 414:

> "Comment:
>
> a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. *The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.*" [Emphasis supplied]

See also *Trent v. Atlantic City Electric Co.*, 334 F.2d 847 (1964) C.C.A. 3.

That the defendant Government retained control over the operative details of doing the safety work cannot be questioned in view of the position description of the Government safety management officer's duties, more specifically, paragraph 3 of the job description entitled "Representative Duties"; which creates a duty of said officer to:

> "Call(s) attention to any of the several contractors to violations or disregard by employees to provisions of contract obligations as specified in the Bureau Handbook 'Safety Requirements for Construction by Contract'. Insists on compliance to those provisions and the taking of corrective measures to prevent reoccurrence of violations."

The heretofore mentioned job description designates Gaulke to enforce the bureau safety manual. Pertinent parts of the Government's safety manual are set forth hereinafter to illustrate that the Government employees, by their own testimony, previous to plaintiffs' accident, enforced these provisions. When compared with the evidence adduced it is unrefuted that the Government inspectors and engineers, Gaulke, Blake, Anderson and his twelve to fifteen subordinates, controlled work and working conditions, thus subjecting the Government to liability for any negligent performance thereof. It is significant that all of these sections were ignored by the Government at the time of the accident—all of which, increased the hazard to the employees of the contractor. See:

> "1-1. This manual establishes the health and safety requirements for construction by contract, and is applicable to all construction operations performed for the Bureau of Reclamation by its contractors and subcontractors."
>
> * * * * * * *
>
> "2-4. *Safety Personnel.* Each contractor shall designate a competent supervisory employee to effectively carry out his health and safety program. Where the nature or size of the job warrants, the Contracting Officer may, at his option, request the contractor to employ a fulltime, qualified Safety Engineer."
>
> * * * * * * *
>
> "SAFETY BELTS AND NETS
>
> 7-20. Employees working from unguarded heights, on steep slopes, or otherwise subjected to falls hazardous to life and limb, shall be secured by safety belts and lines *or protected by use of safety nets. Safety nets shall be used to protect employees erecting or maintaining bridges, or similar structures, or employed in shafts on steep slopes where it is not practical to 'tie*

off.' Safety nets shall be maintained abreast of the operations in order to provide effective protection for the employees exposed to falls. [Emphasis supplied]

* * * * * * *

"9-1. Before any machinery or mechanized equipment is put into use on the job, it shall be inspected and tested by a qualified person and determined to be in safe operating condition, and appropriate for the intended use. Continued periodic inspection shall be made at such intervals as are necessary to insure safe operation and proper maintenance."

"9-2. Any machinery or equipment found to be in unsafe operating condition shall not be operated until the unsafe condition is corrected. Necessary precaution shall be taken to assure that it is not operated in the unsafe condition."

* * * * * * *

"9-25. Any guard or safety device removed or made ineffective shall be replaced or restored to safe operating condition immediately after completion of work which required its removal."

* * * * * * *

"9-29. *Required Performance Test for Cranes, Derricks, Cableways and Hoists.* Prior to being placed in operation, all power cranes, derricks, cableways and hoists shall satisfactorily complete a performance test in order to demonstrate the equipment's ability to safely handle and maneuver the rated loads."

"c. *Derricks, Cableways and Hoists.* All derricks, cableways and hoists, including overhead cranes, shall be performance tested with a test load weighing 110 percent of the manufacturer's rating. In testing cableways, the test load shall be traveled to the upstream and downstream limits of travel and *thoroughly* performance tested in at least three travel positions, including the upstream and downstream limits."

"d. *Record of Test.* Performance tests shall be conducted in the presence of a Bureau representative, and a report of the test submitted to the Contracting Officer's representative. Refer to Figure 19, Record of Test—Mobile Cranes."

* * * * * * *

"9-79. Hoists used to transport men shall be equipped with a fully enclosed cage, provided with a gate. Sides shall be 1½ inch mesh screen formed of No. 16 U.S. gage wire, or equivalent, and equipped with toeboards."

* * * * * * *

"16-13. Lumber used in construction of platforms, ramps, runways, temporary floors, and scaffolds shall be of good quality, sound, straight-grained, and free from shakes, checks, dry rot, and large, loose or dead knots. *Scaffolds shall be regularly inspected and maintained in safe condition."*

* * * * * * *

"16-19. *Runways, ramps, platforms, and scaffolds of 6 feet or more in height above the adjoining surface shall be effectively guarded with toeboards and guardrails."*

"16-20. *Wooden guardrails* shall be rigidly supported at intervals not exceeding 8 feet. The height may be from 36 to 42 inches, and intermediate rails shall be provided."

"16-21. Toeboards not less than 6 inches in height or side screens shall be provided as needed to protect employees from falling objects."

* * * * * * *

"16-25. *Handrails* shall be installed on all stairs with four or more risers, around all stairwells, and at stair landings. Where adequate protection is not furnished by guardrails, an intermediate rail or screen shall be provided. Toeboards not less than 6 inches in height, or screens, shall be installed around stairwells."

* * * * * * *

"17-16. Walkways or scaffolding equipped with guardrails shall be provided at the point of placement in walls, piers, columns, etc., located over 10 feet above ground level."

* * * * * * *

"17-21. Form scaffolding shall be designed and constructed as provided in Section XVI, unless an alternate design is specifically approved by the Contracting Officer's authorized representative. *All scaffolding shall be maintained in good repair and in safe condition.*"

* * * * * * *

"18-2. *On bridges over 25 feet* in height from the ground level, *rope safety nets shall be provided and suspended below points where men are working.* The nets shall be made of at least ½ inch-diameter manila rope with ¾ inch-diameter borders and 4- by 4-inch mesh. The borders shall be provided with loops for attachment to each other or to the structure frame. Nets shall be kept free of materials and maintained abreast of the operations."

* * * * * * *

"18-14. All hoists and rigging shall be in accordance with the requirements of Section IX, Machinery and Mechanized Equipment, and Section XI, Ropes, Cables, and Chains." (Emphasis supplied)

See also illustrative pictures of scaffold designs adopted from the U. S. Corps of Engineers. See pictures pointing out safety railings, toeboards, etc., at pp. 225, 227 of Exhibit No. 5.

Arizona has long since established the rule applicable herein that the trial court chose to disregard, see *Arizona Binghampton Copper Co. v. Dickson*, (1920) 22 Ariz. 163, 195 Pac. 538, 540:

"*If the employer retains the right of control,* or—as in this case—he agrees to furnish the instrumentalities to the contractor to be used in his work, and the latter

is injured by reason of their being defective, a different rule comes into play. The rule deducible from the decisions is well stated in 14 R. C. L. 81, section 19, as follows:

> *'Where the employer reserves the right to direct the manner of the performance of the contract in any particular,* or where he undertakes to provide any of the instrumentalities, *he owes to the contractor and the latter's employees the duty of exercising reasonable care in respect to such matters.'*

"The reason for such rule is that the law imposes upon every owner of premises the duty of keeping them in a reasonably safe condition so that anybody whether contractor, servant, or invitee, lawfully thereon, may not be unduly exposed to danger." (Emphasis supplied)

On cross examination defense counsel elicited a very cogent statement from appellant Rodgers showing complete reliance upon the government; at T.P. 313:

> "Q. By Mr. Westover: Well, now truthfully, Mr. Rodgers, you did not think about whether the Government safety inspectors were inspecting the places that you were working or not, did you; you didn't even give that any thought before the accident?
>
> A. *Yes, I sure did.*" (Emphasis supplied)

The unrefuted testimony of general foreman Mark Weaver clearly illustrates the Government's interference with and exercising of control over the method and manner of how the work was to be executed; compare on pages 24-25 T.P.:

> "Q. From your observation of the Bureau men, can you tell me with respect to the inspectors which one of them, or which ones of them, or who had safety as part of their duties in conjunction with other duties?

A. *Well, all the inspectors could reject anything that wasn't safe, and they did.*

Q. All the inspectors?

A. But they would generally get in touch with Mr. Blake, and then he in turn would get in touch with me.

Q. *And I take it that would mean the grouting inspectors, the supervisory construction inspectors, and so forth?*

A. *Right.*

Q. *And this, to your knowledge, you know to be part of your duties in conjunction with their regular duties?*

A. *I know it to be true that they did this.*"

* * * * * * *

"Q. By Mr. Brewer: What did you understand Mr. Blake's job to be with respect to the dam, please?

A. He was the Safety Management Bureau.

Q. And did you come in contact with him?

A. Yes, daily.

Q. Daily?

And you would please tell us in what respects you came in contact with him, what would transpire between the two of you?

A. Well, if Mr. Blake seen anything that he figured was unsafe, he would come to me personally and ask for it to be corrected.

Q. Did you have occasion to correct things that he would ask for?

A. Yes.

Q. *Now, with regard to him coming to you, how often and on what occasions would he come to you?*

A. *I would say that on the average it could possibly be twice a day.*

Q. *Twice a day he would come to you with regard to something he observed unsafe?*

A. *I would say on an average, yes.*

Q. *And as general foreman, would you see that his requests were carried out, please?*

A. *Yes.*" (Emphasis supplied)

Control and *implementation* of the safety over the dam was actively exercised by the safety engineer. See T.P. 14-15:

"Q. Incidentally, did Mr. Blake have any specific items or things that he was more interested in with regard to safety than any other things?

A. Yes, I would say that Mr. Blake was—his pet peeve was a handrail.

Mr. Westover: I'm sorry, your Honor. What was the answer?

The Witness: His pet peeve was a handrail.

Q. By Mr. Brewer: Did you have occasion to install handrails at his request?

A. Yes, constantly.

Q. With regard to the safety program on the dam, can you tell us from your observation and your position as general foreman who controlled and implemented the safety program and instructed you to do various things?

* * * * * * *

The Witness: The Bureau had the final say on our safety program."

It is noteworthy that the Government safety management officer not only controlled safety, but actually had the responsibility over the *designs, stresses* and *strains, general rigging, weight* and *factors of safety* "on equipment like this"; (T.P. 134)

"Q. Let me ask you if you said this in your deposition, at page 36, line 4:

'The Witness: It was a practice of mine to go over to Merritt-Chapman's office and discuss it with their design engineer when they made such a contraption, to see what strains and stresses would be placed on it at different times.'

A. Yes, sir.

Q. 'A young man over there by the name of Smith who designed all such structures, *and I would confer with him over there and see that it had a good factor of safety.*'

'Question: *That was a part of your job to do this, I take it?*

Answer: *Yes.*'

Then, at line 26 of 36, I said:

'But the general rigging and the weight would be your responsibility?

'Answer: *Yes, sir. I didn't say that I checked every piece of equipment that went down there, but something like this,* I would have probably checked it over with Smith.'

"Did you give those answers to that question?

A. I would probably have checked it over, but I didn't say that I did, sir. I don't recall checking that particular piece of equipment."

* * * * * * *

"Q. Mr. Gaulke, when the jumbo was placed down in any other area, was this pin type of anchor setup ever used before?

A. Not to my knowledge, no.

Q. You check over these designs to see if they are safe working conditions for the personnel, don't you? 'Yes' or 'no'?

A. Yes, at that time, that's not always my responsibility, I get other people to do it. I have their assurance that things are all right, but I can't make all inspections myself. I'm not the—"

In reference to the duties performed by Safety Inspector Blake, Gaulke testified:

"Q. By Mr. Brewer: This was his daily job, to stop unsafe conditions in every place that he went; is that correct?

A. Part of his work. If you will read his inspection report, you will see that he conducted safety meetings—" (T.P. 123)

In conjunction with the foregoing testimony, numerous other examples of control retention and work direction can be observed throughout the transcript at pages 8, 11, 12, 14, 15, 24, 29, 34, 35, 42, 51, 53, 372-375, 377, 401, 417.

The District Court case of *San Felice v. United States,* (1958 W.D. Pa.) 162 F. Supp. 261, at 263, succinctly sets out the prevailing rule of law in comparable Federal Tort Claims Act cases wherein the government retains control but then negligently fails to conduct and carry out a proper inspection on behalf of employees of an independent contractor:

> "In addition even if the court were in error in so concluding, another cogent reason exists upon which the liability of United States must be fastened. It is apparent that where the employer has retained some element of control of the job, he should be responsible for the harmful consequence of its performance as a concomitant of the control retained. (citing cases)
>
> "The evidence supports the conclusion that United States was at all times the possessor of the land by and through its construction engineer, maintained control of all areas of Keystone and directed the work to be done and the manner in which it was to be accomplished. That said direction and control was negligently exercised and was the proximate cause in bringing about plaintiffs' injuries. *I am further satisfied that the negligent conduct of Matthew in failing to conduct a more assiduous investigation and* intensive inquiry from United States engineers in view of the extrahazardous nature of the work to be conducted, was the concurrent contributing factor in the resulting explosion and accident." (Emphasis supplied)

Compare also *Jamison v. A. M. Byers Company* (1964) 330 F.2d 657, 660:

> "Assuming that the defendant retained control over Allegheny's shoring operation then the instant case is

well within our holding in Quinones v. Township of Upper Moreland, 3 Cir., 293 F.2d 237 (1961). There the defendant's Engineer was authorized to assure compliance, by an independent contractor, with the terms of a contract. It appeared from the evidence that an employee of the Engineer visited the job site "two or three times a week" and that he knew the day before the accident that no shoring had been done on a particular excavation, but did not order shoring. We upheld the jury's finding that the Township was liable to the estate of a worker killed when the excavation caved in."

"In doing so we said at page 241 of 293 F.2d:

'What has been said makes it clear that there was ample basis for the jury's fact-finding that Township (1) had "retained control" in the performance of McCabe's [the in-independant contractor] contract, and (2) was negligent in not having required McCabe to shore the trench * * *. Under the circumstances here [this] constituted negligence on the part of the Township.'

In Quinones there was 'retention of control' coupled with a failure to properly exercise that control. Here the jury found that the defendant retained control and did nothing to ascertain the condition of the shoring or to remedy any defects that it might have known of."

In view of the over-all gigantic public works project in constructing this huge dam, the government deemed it necessary to retain control over the work with full-time inspectors directing each phase thereof and in conjunction therewith, maintained a full-time safety program executed and implemented by each government inspector. Government control herein was necessary because of the hazardous aspects of the dam, these necessitated a Government dam engineer (Anderson) to be assisted by some fifteen inspectors concerned with safety and engineering, coupled with the addition of two full time safety inspectors under safety management officer Gaulke (see Exhibit 8). Appellants, at

the risk of a protracted brief, deem it necessary to cite those salient portions of the Government and independent employees' testimony pointing out the autonomy of control which existed on the dam as acknowledged by the Arizona Industrial Commission and Merritt-Chapman & Scott, both of whom were lulled into a sense of security. Examples of reliance on the Government can be illustrated by such as the safety net that caught a falling ironworker in the east spillway, continued enforcement of safety officer Blake's pet peeve "handrails"—that the constant presence of inspectors and safety direction on all phases of the job created a reliance by the workers. It was this continued conduct of the Government inspectors and engineers that not only created reliance by Merritt-Chapman & Scott, but also by their employees, and axiomatically imposed liability on the Government for the negligent performance of a voluntary duty previously assumed.

The uncontradicted evidence adduced is that the Government inspectors worked side by side with the employees of the independent contractor for as much as six hours per day. (See also Exhibit No. 2, which depicts Government safety inspectors side by side with ironworkers on the jumbo.) When one takes into consideration the magnitude of the dam and its complexities and size thereof, it is crystal clear that the Government intended to and did retain control over the work, the engineering, and the safety factors concerning the entire construction of the dam. Exhibit 8 in evidence readily discloses that safety management officer Gaulke was in charge of the safety management of the dam and that he was given two full-time assistants to coordinate this necessary job on such a huge construction site. Gaulke, by his own testimony, not only controls safety but also was responsible for all devices

and contraptions "such as this (jumbo)" for safety factors, weight, stresses, strains, designs and general rigging. Supervisory construction engineer for the Government Eugene B. Anderson, in his deposition at page 3 (admitted in evidence) stated that he had been doing construction engineering work *on dams* for "about 20 years." His job description (Ex. 9) discloses his title as Supervisory Construction Engineer (Dams)—*Representative Duties:*

* * * * * * *

"In conformance with the Region 4 Safety Program, is responsible for administering safety on the work under his direction. Instructs and trains employees in safe on-the-job work practices. Investigates and reports on accidents occurring on work under his direction and takes necessary measures to have responsible hazards corrected."

See Anderson's Depo. pg. 5, lines 14-through 21.

"A. I had a fellow named Brown, and at that time I was in charge of the—of all operations on the dam. *And I had, oh, possibly 12, 15 inspectors under me.*

Q. *Did part of that inspecting entail safety?*

A. *Yes, all inspectors are interested in safety on the job.*"

* * * * * * *

Q. *Are you supposed to not only note it but go look for it?*

A. *Oh, yes. We are looking for it all the time, oh, yes.*" (Emphasis supplied)

Anderson inspected the pin many times himself (Depo., pg. 19).

It is fundamental that Merritt-Chapman & Scott would not have just ignored safety control over the dam, which by its size alone caused the Government to have fifteen men under Anderson and two full-time safety inspectors under

the chief safety management officer. The idea that Merritt-Chapman & Scott utilized a *single* expeditor, or errand boy, after the accident, in lieu of these numerous Government inspectors, trained to implement safe procedures and working conditions, is untenable. The testimony of Anderson readily points out that engineers are necessary in the utilization of hazardous activities, compare: (pg. 22, Anderson Depo.)

> "Q. Let me ask you this:
> How can you expect a guy with a fifth or sixth grade education to know the dynamics of engineering?
> A. They won't—
> Mr. Gormley: That is argumentative.
> The Witness: They won't hire engineers with fifth and sixth grade education."

The substantive law of the state of Arizona controls herein. *Rayonier Inc. v. United States,* 352 US 315, 1 L.Ed 2d 354, 77 S Ct 374. That the Arizona Courts have adopted appellants' position hereinabove stated is without dispute in view of the very recent case law rendered by the Courts. Because of the applicability of these cases, plaintiffs feel the necessity to quote extensively the pertinent parts therein. In *Fluor Corporation v. Sykes* (1966) .... Ariz. App. ...., 413 P2d 270, the Court stated:

> "The question remains, and is assigned as error on appeal, as to whether any negligence of Fluor could have been the proximate cause of this accident. The contention is made that the act of Graver employees in using oxygen for ventilation is a superseding cause, thus cutting off any possible liability on the part of Fluor. The argument is made that it might be possible for Fluor to foresee that the failure to provide proper ventilation might result in asphyxiation, nausea or similar injury, but that it was not foreseeable that oxygen might be used for ventilation, thus causing death by burning.

"There are two answers to this contention. The first is that, as the quoted portions of the Restatement (Second), Law of Torts, section 414 indicates, liability of a person retaining control may arise if such person ' * * knows or by the exercise of reasonable care should know that the subcontractors' work is being so done * * *.'* In this case, the evidence is that the use of this oxygen tank for ventilation had been going on for at least six hours prior to Sykes' injury. In an answer to an interrogatory, which was offered in evidence by the plaintiff but wrongfully excluded by the trial court, the defendant Fluor admitted that the use of oxygen for ventilation is '* * * not considered * * * safe * * *' because it '* * * does support and induce combustion.' *There was evidence that Fluor inspectors were on the job on a daily basis. From this, the jury might very well find that Fluor should have known of the unsafe practice being followed.* (pp. 274-275).

* * * * * * *

"Fluor also complains of the failure to give its requested instruction No. 2, which would have told the jury, among other things, that Fluor '* * * was not responsible for the acts or omissions of the Graver Tank Company, or for the acts or omissions of employees of Graver Tank Company.' *While the defendant may, on retrial, be entitled to an instruction informing the jury that it is not responsible generally for the acts or omissions of Graver, this must be qualified, if there be evidence that Fluor retained certain control over the activities of Graver, to permit liability under the theory enunciated in section 414 of the Restatement (Second), Torts, previously quoted herein.* The instruction submitted did not contain this exception and therefore we see no error in refusing to give the instruction. (pp. 275-276) (Emphasis Supplied).

See also *Welker v. Kennecott Copper Company* (1965) 1 Ariz. App. 395, 403 P.2d 330, 340-341;

"There remains only the contention of the appellant that there was sufficient evidence of control on the part of Kennecott to submit a case to the jury under the rule of law stated in § 414 of the Restatement of Torts.

* * * * * * *

"Our Supreme Court has previously applied the law of this section to third persons. Matsumato v. Arizona Sand and Rock Company, 80 Ariz. 232, 295 P.2d 850, 56 A.L.R.2d 1385 [1956]. There is public policy involved in the elimination of causes of accidents. The division of control, particularly in the area of safety precautions, may have some tendency to cause accidents. The Court of Appeals of New York has noted this tendency in this language:

> *'Uncertainty regarding the division of responsibility for safety precautions between subcontractors and general contractors not only produces litigation over accidents that have happened, but is probably a prime cause of their happening in the first place.'* Wright v. Belt Associates, Inc., 14 N.Y.2d 129, 249 N.Y.S.2d 416, p. 420, 198 N.E.2d 590, pp. 592-593. [1964]

"For the foregoing reasons, this court holds that the duties outlined in § 414 of the Restatement of Torts are owed by the contractee to workmen on the job, and will proceed to consider whether Kennecott retained any controls, the failure to prudently exercise which may have been a proximate cause of this accident.

"During the testimony, Kennecott officials referred to this as a 'turnkey' job and likened it to the situation where someone employed an independent contractor to build a house for him. To the court, these analogies are without foundation in the evidence. *Under this contract, no important employee could be employed without Kennecott's approval, the salaries to be paid*

to all key employees were subject to Kennecott's approval, Kennecott could discharge any employee on the job, and no drawing detailing how the work was to be performed could be released to the field without prior approval by Kennecott. If Kennecott were interested only in results, many of these controls are unnecessary.

"The argument is made that these controls were there to control cost. This is undoubtedly true, but the fallacy of the argument is that costs and safety are inextricably related under this contract. For instance, a sloping of the banks in question would have been a cost borne by Kennecott, which additional cost might have prevented this accident. Kennecott, under this contract, was in control of whether these banks would be sloped, both through its control of the detailed drawings of the work *and its control over the safety engineer,* whose selection was specifically made subject to Kennecott approval and could be discharged at any time by Kennecott. The basic instability of the subject soil was well known to Kennecott and it was well qualified to draw conclusions as to whether excavations should have been sloped and/or shored. *This court holds that under the facts of this case, the jury might have found that Kennecott was negligent in exercising its control* over the details of the excavation work and/*or over the safety program,* and that such negligence was one of the causes of this accident. (Emphasis Supplied)

2. The Trial Court Erred in Refusing to Consider Liability on the Part of the Government for the Negligent Performance of a Voluntary Duty Which Increased the Hazards to the Employees of Merritt-Chapman & Scott.

Plaintiffs' action is based upon careless and negligent acts of the government in view of their control of the work, engineering, and safety program implemented in conjunction therewith. The learned Justice Cardozo succinctly

spelled out the "Good Samaritan" doctrine in *Glanzer v. Shepard,* 233 N.Y. 236, 135 N.E. 275, 276, 23 A.L.R. 1425, when he said:

> "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

See also: 38 Am. Jur., Neg. sec. 17; 5 Harvard Law Review 222. This doctrine has also been recognized in Arizona, see *Taylor v. Roosevelt Irr. Dist.,* 72 Ariz. 160, 232 P.2d 107, 110:

> "* * * It is the law that if one who is under no duty to another to protect him in person or property voluntarily assumes such a duty, he must perform it in a reasonably careful manner, and while he is not bound to continue that duty permanently he must see that reasonable notice is given if he intends no longer to perform it. Cummings v. Henninger, 28 Ariz. 207, 236 P. 701, 41 A.L.R. 207; Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952, 120 A.L.R. 1521."

Arizona adheres to the views of the Restatement of Torts (*MacNeil v. Perkins,* 84 Ariz. 74, 324 P.2d 211; *Serrano v. Kenneth A. Ethridge Contracting Co.,* 2 Ariz. App. 473, 409 P.2d 757);

> "* * * (1) One who gratuitously renders services to another, * * * is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise such competence and skill as he possesses" § 323(1) *Restatement of Torts 2d.*

The most exhaustive case delving fully into every aspect of negligence resulting from a voluntary undertaking is *Nelson v. Union Wire Rope Corporation,* (Ill. 1964), 199 N.E.2d 769, starting at 774:

"* * * As is shown by defendant's own citation of authority, viz., Viduvich v. Greater New York Mutual Insurance Co., 80 N.J. Super. 15, 192 A. 2d 596, plaintiffs, to support their actions, had only to show (1) that defendant undertook to make safety inspections and to render safety engineering services under circumstances which created a duty on defendant, owed to plaintiffs, to perform its undertaking with due care, and (2) that the gratuitous undertakings were negligently performed, such negligence resulting proximately in plaintiffs deaths and injuries [citing cases] * * * *It is this: that in all cases in which any person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law,* ipso facto *imposes, as a public duty, the obligation to exercise such care and skill.*" * * * "While recently analyzing the Van Winkle case in Viducich v. Greater New York Mutual Insurance Co., 80 N.J. Super. 15, 192 A.2d 596, a New Jersey appeals court again *manifested the view that the repeated inspections and the furnishing of certificates for the guidance of Ivanhoe's engineer were circumstances which created a duty upon the insurer to inspect with due care.*" (Emphasis supplied)

* * * * * * *

"Defendant's duty here did not arise by virtue of its control, or right to control, the equipment, and neither did it arise as the result of any relationship with Auchter or its employees. *The duty arose, rather, by operation of law from defendant's own independent and gratuitous course of conduct. Moreover, plaintiffs' charges of negligence are not based upon a defect in the equipment or upon conduct of Auchter's employees, but upon defendant's negligent performance of its gratuitous undertaking.* The Smith, Pabst and Van Winkle cases, as well as Triolo v. Frisella, 3 Ill.App.2d 200, 121 N.E.2d 49, are a complete rejection of any concept

that control of the premises where negligence occurs is essential to the liability of a gratuitous actor." (Emphasis supplied)

* * * * * * *

"* * * *This theory however, either overlooks or misapprehends that defendant was charged with misfeasance, to-wit, that it gratuitously undertook to make safety inspections of the equipment, and practices of its insured, and that it had 'carelessly and negligently performed the said inspections on a certain elevator, or, hoist so that as a direct and proximate result thereof certain plaintiffs were injured and decedents of certain plaintiffs killed'* Defendant was not charged with liability for omitting to preform an undertaking which plaintiffs or Auchter expected or relied upon it to undertake, (see: United States v. DeVane (5th Cir.), 306 F.2d 182, 183; Restatement of Torts, § 325) *but was charged with having undertaken to perform safety inspections, a lawful act, and with having done so carelessly and negligently.* (See: Smith v. American Employers' Ins. Co., 102 N.H. 530, 163 A.2d 564; Restatement of Torts, § 323(1).) *By undertaking to act defendant became subject to a duty with respect to the manner of performance.* [Citing cases]" [Emphasis supplied]

See also: *Bollin v. Elevator Const. & Repair Co.,* 361 Pa. 7, 63 A.2d 19.

Under the facts of this record, appellee, United States, is liable for its negligence. See *Indian Towing Co. v. United States,* (1955) 350 U.S. 61, 68, 100 L.Ed. 48, 56, 76 S.Ct. 122:

"The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care, to make certain that the light was kept in good working order; and, if the light did become

extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

See also: *Rayonier v. United States,* 352 U.S. 315, 1 L.Ed. 354, 77 S.Ct. 374; *United States v. Gavagan,* 280 F.2d 319; *United States v. DeVane* (1962), 306 F.2d 182; *United States v. Lawter,* (5 C.C.A. 1955), 219 F.2d 559, at page 562; and 38 Am.Jur. "Negligence", § 17; Restatment, Torts, 2d §§ 323, 324.

Therefore, by operation of law, it is elementary that the defendant Government, by virtue of the facts herein, automatically become liable for its negligence by:

1. Failing to take appropriate steps to rectify the hazardous rigging of the jumbo as was chief safety management officer Gaulke's job pursuant to his own testimony. See also United States Department of Reclamation Safety Requirements:

"9-1. Before any machinery or mechanized equipment is put into use on the job, it shall be inspected and tested by a qualified person and determined to be in safe operating condition, and appropriate for the intended use. Continued periodic inspection shall be made at such intervals as are necessary to insure safe operation and proper maintenance.

"9-2. Any machinery or equipment found to be in unsafe operating condition shall not be operated until the unsafe condition is corrected. Necessary precaution shall be taken to assure that it is not operated in the unsafe condition."

In all candor, Government supervision construction engineer Anderson deplored the method of rigging and voiced

his expert opinion as to its hazardous features, which he claimed he was not aware of said conditions in spite of his repeated inspections pursuant to the duties outlined in his job description (Ex. 9 in evidence).

2. The Government's unexcused failure to enforce on *this* occasion, as opposed to its former regular practices of rectifying the per se violations of safety practices and rules and regulations requiring nets, guardrails, handrails and toeboards on the jumbo. (See Exhibit 5—United States Department of Interior Safety Requirements by Contract; Exhibit 14—General Construction Safety Code of the Industrial Commission of Arizona).

3. One Who Employs an Independent Contractor to Do Work Which Should Be Recognized as Containing Conditions of an Unreasonable Risk of Bodily Harm Unless Special Precautions Are Taken, Is Subject to Liability to the Employees of the Independent Contractor for the Failure to Take Such Precautions.

It must be conceded that working on a scaffold 500 feet above the floor of the Colorado River is hazardous. This inherently dangerous situation was readily apparent to the Bureau of Reclamation when they revised their chief safety management officers' duties, see Exhibit 8:

> "The dam is now about 500 feet above the river. This great height increases the hazard to workmen from possible falls and injury to workmen below from falling objects. * * * In recognition of these factors, the safety program of necessity has been broadened to such an extent that proper administration requires the function to be placed at an administrative level with the Safety Officer reporting directly to the Project Construction Engineer. * * *"

Therefore, in view of the foregoing and the evidence presented, it was incumbent upon the defendant Government to

take steps to rectify the perilous situation then existing; see *United States v. White* (C.C.A. 9th Cir.) 211 F.2d 79. See also: *United Airlines Inc. v. Wiener* (C.C.A. 9th Cir. 1964) 335 F.2d 379.

The court ruled in *Hopson v. United States* (1956, D.C. Ark.) 136 F. Supp. 804 that the claimant, who had been employed by an independent contractor, was killed while working in the depot, assisting the operator of a joinder machine to remove the inhibitor strips from a substance known as "ballistite." In concluding that the "discretionary function" exception was inapplicable, the court said that if the navy inspectors employed by the Government in the depot were guilty of negligence causing the employee's death, the claim would not be barred.

It has universally been held that owners of premises owe the duty of care to employees of independent contractors in the performance of a non-delegable duty when the owner is put on notice of a dangerous condition of his premises. Compare *Schwartz v. Merola Bros. Construction Corp.,* 290 N.Y. 145, 48 N.E. 2d 299, 302 and cases cited therein. Thus, when the jumbo slipped just seven days prior to appellants' severe accident, the Government therefore was totally aware of this hazardous condition. They did inspect the jumbo, however, they did not make any changes in the rigging and safety features until after it fell the second time on April 15, 1964 with appellants aboard (T.R. 44, 129). Compare the California Supreme Court case of *Kuntz v. Del E. Webb Construction Company,* 18 Cal. Rptr. 527, 368 P.2d 127, wherein it was held that the general contractor's knowledge that ironworkers are normally exposed to dangers and owed a duty to warn ironworkers working at story levels or to take corrective steps to keep the premises reasonably safe for ironworkers to utilize, and further held that it was

immaterial that the danger could have been due in part to the negligence of another contractor working on the premises; see also the Restatement of Torts, Section 449.

The lower court's consideration of the "form" contract between the Government and the independent contractor should have had no bearing in this case since plaintiffs were strangers to that contract and the Government cannot, after committing a negligent act, hide behind the skirts of such a nebulous argument. See *Bollin v. Elevator Const. & Repair Co.,* 361 Pa. 7, 63 A.2d 19, 21:

> "* * * In construing the policy the court said: that it was plain that the defendant company was in nowise obligated by its contract to make any inspections whatever; it acquired the right to do so when it chose to do so, and if it had altogether refrained from making an inspection, it would seem clear that it would have incurred no responsibility either to the assured or to the plaintiff. But the defendant having, in the exercise of its volition, made repeated inspections of the boiler and furnished the required certificates, no one could doubt that, by this course of action, a duty was imposed on it, by operation of the contract itself, to act with ordinary care and skill, both with respect to its inspection and its certificate and that there could be no room to doubt that, for the proximate damages occasioned by the absence of such care and skill, the defendant would be answerable to the assured under the contract. The court further said, in regard to the plaintiff who was a stranger to the contract, that there was a broader ground on which the case could be based. It was that, in all cases in which any person undertakes the performance of any act which, if not done with care and skill, will be highly dangerous to the safety of persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill."

The reasoning behind the foregoing is set forth in *Sheridan v. Aetna Casualty & Surety Co.,* 3 Wash. 2d 423, 100 P.2d 1024, 1031, wherein the plaintiff fell in an elevator shaft and brought suit against the owners of the building; the court held as follows:

> "* * * But for neither the nonperformance nor the malperformance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation, for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done.
>
> "In Anderson v. London Guarantee & Accident Co., 295 Pa. 368, 145 A. 431, 433, it is said by the court that one controlling the operation of a boiler is bound to make reasonable inspection to guard against explosions which may cause injuries to his own employees or to third parties, and that this responsibility may be enforced against an insuring company, citing the Van Winkle case, and continues: '*But the right of such an indemnitor to inspect does not impose upon it a duty to do so, though, if it sees fit to exercise the privilege, it becomes responsible for the negligence of those appointed to supervise* (Hartford Steam Boiler Ins. Co. v. Pabst Brewing Co. [7 Cir.], 201 F. 617, Ann. Cas. 1915A, 637), if it fails to put in charge competent individuals (Anderson v. Hays Mfg. Co., 207 Pa. 106, 56 A. 345, 63 L.R.A. 540).'" [Emphasis supplied]

It is evident that in the assumption of the safety program and control the work on its *own* dam, the Government lulled the safety department of the Arizona Industrial Commission, the contractors, the subcontractors and the employees thereof, to wit: Plaintiffs Roberson and Rodgers, into a sense of false security when in fact a hazardous and dangerous situation existed. See: *Sheridan v. Aetna Casualty & Surety Co.,* supra, at page 1032 of 100 P.2d:

"* * * But, assuming reports to have been made to the city by that company of the elevator's condition, the fact does not exculpate the appellant. *Its reports might well be found by the jury to have lulled the building department of the city into a sense of security, in respect to the elevator, and that the reports were causes contributing proximately to respondent's injury.*" [Emphasis supplied]

4. The Lower Court Erred in Refusing to Admit Into Evidence the Manual of Accident Prevention in Construction, When Said Manual Is the Recommended Guide in Establishing Safety Practices for Construction Work.

Under the circumstances of this case, the manual of accident prevention in construction should have been admitted as some evidence of the appropriate standard of care to be utilized on the Glen Canyon Dam in Page, Arizona. The rejection of plaintiff's Exhibit 15, in evidence, contradicts the United States Department of Interior, Bureau of Reclamation—Safety Requirements for Construction by Contracts, (Exhibit 5 in evidence) which states on page 1 thereof:

"1-4. It is recommended that the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, be used as a guide in establishing safe practices for construction work."

See also: *Fluor Corp. v. Black* (9th Cir. 1964), 338 F.2d 830.

It is note-worthy that § 14-8 therein prominently displays a U. S. Army Corps of Engineers picture of how safety nets should be provided. Other important features are as follows:

1. § 14-5—a lengthy discription on where safety nets are required and how they should be installed.

2. § 15-2—displays a picture of scaffolds and sets forth a criteria for inspection thereof.

3. § 15-8.3—sets forth various types of scaffold machines for lowering and raising scaffolds, stating "the lock and winch mechanism should be maintained in first-rate operating condition at all times and should be inspected frequently".

4. § 15-8.4—Installation of guardrails.

5. § 15-8.5—Installation of toeboards.

A casual perusal of the manual of accident prevention in construction readily discloses why the government recommends the use of this manual since it contains numerous pictorial illustrations which would have readily acted as a guide to any one of the 18 inspectors had they merely chosen to leaf through its contents.

Ironically enough, safety management officer Gaulke possessed this text, (T.P. 405-406):

> "Mr. Brewer: Might we have the bailiff show the witness No. 15 for identification?
>
> (Handed to witness)
>
> Q. By Mr. Brewer: Have you ever seen this type of book before, please, sir?
>
> A. Yes.
>
> Q. You have one in your possession?
>
> A. Yes sir.
>
> Q. You utilize it in your safety work?
>
> A. I use it for reference."

5. The Court Erred in Amending the Proposed Order for the Judgment, and Amending Its Judgment Without Finding as a Fact, That if It Were Necessary for the Court to Determine the Question of Contributory Negligence of the Plaintiffs, and Reach a Conclusion in This Respect, That It Would Conclude That the Plaintiffs Were Guilty of Contributory Negligence in Working on the Jumbo, Without the Use of Safety Belts for the Reasons That There Was Absolutely No Evidence Presented in Plaintiffs' Presentation of the Evidence That the Failure of the Plaintiffs to Wear Safety Belts Was Negligence, but Rather That It Was Customary, Proper, Necessary, and Safer Not to Wear Same While Working on the Jumbo, Nor Was There Anything to Even Attach Safety Belts to Since the Handrails and Hook-on Rails Had Been Removed and Never Replaced and That Safety Nets Had always Been Used to Afford Protection and Mobility While on the Jumbo. Further, That This Defense Is Not Available Under the Hazardous Occupations Statutes of Arizona, A.R.S. §§ 23-805; Further, That the Proximate Cause of the Injuries Sustained by the Plaintiffs as Conclusively Shown by the Evidence to Have Been the Faulty Inspection and Lack of Enforcement of Safety Requirements by the Defendant United States Government, and Not the Failure of the Plaintiffs to Wear Safety Belts While Working on the Jumbo.

It is unrefuted by every witness that testified concerning safety belts that they could not be used because:

1. There were no hook-on rails, hand rails or guard rails to attach a safety belt to at the time of the accident, since they had been removed and never replaced.

2. That it was impractical and impossible to work on the jumbo tied to a short piece of rope.

3. That safety belts had never been utilized before and safety nets were always used in the east spill-way and in the west spill-way after the accident.

4. That Government inspectors who were on the jumbo all day long (T.P. 160) never utilized safety belts. (Compare T.P., pgs. 17, 46, 47, 48, 56, 68, 100, 284, 287, 304, 361, 372, 375, 416, 417, 430, 431 and 432).

See also the Bureau of Reclamation Safety Requirements for Construction by Contract § 7-20:

> "* * * Safety nets shall be used to protect employees erecting or maintaining bridges, or similar structures, or employed in shafts on steeps slopes where it is not practical to 'tie off.' Safety nets shall be maintained abreast of the operations in order to provide effective protection for the employees exposed to falls."

It is crystal clear that the Government was negligent in not maintaining the safety devices used in the east spill-way, such as handrails, hook-on rails, toeboards and screening as depicted in Exhibit 2 in evidence (photograph taken in the east spill-way of jumbo).

There was absolutely no evidence whatsoever that plaintiffs were guilty of any contributory negligence, and therefore, the court should not have speculated in his amended order for judgment as to same. That plaintiff Rodgers testified that it would be impossible to use a safety belt (T.P. 432).

Therefore in light of the foregoing when there is no evidence of contributory negligence there should have been no mention thereof. See *Sax v. Kopelman* (1964), 96 Ariz. 394, 396 P.2d 17.

Assuming, but not conceding, that plaintiffs were guilty of contributory negligence this defense would not be available. Compare A.R.S. 23-805 which negates this defense by comparative negligence.

See § 23-803 A.R.S.

> "The following occupations are hazardous within the meaning of this article:
>
> * * * * * * *
>
> "4. The operation of elevators, elevating machines, derricks *or hoisting apparatus used within or on the outside of a bridge,* building or other structure for

conveying materials in connection with the erection or demolition of the bridge, building or structure.

"5. *All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath used in the erection, construction, repair, painting or alteration of a building, bridge, structure or other work in which a ladder or scaffold is used.*" [Emphasis supplied]

See also: Article 18, Section 7, Arizona Constitution.

The proximate cause of the plaintiffs' injuries, is the negligence of the Government in failing to exercise proper care in inspecting and checking the rigging on the jumbo for stress and strains, weight factors, design, and safety factors as was Gaulke's job; and in addition thereto, the Government failed to maintain the safety devices on the jumbo that had previously been installed and replaced on numerous occasions prior to appellants' accident all of which increased the hazards to plaintiffs.

CONCLUSION

Upon all of the grounds, and for all the reasons set forth hereinabove, it is respectfully submitted that the Findings of Fact and Conclusions of Law and Judgment of the District Court appealed from should be reversed and remanded with instructions to reinstate plaintiffs' complaint and to direct the parties to proceed to trial thereon in conformance with the applicable rules of law.

Respectfully submitted

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES M. BREWER

Appendix

PLAINTIFFS' EXHIBITS

	For Ident.	In Evidence
1—Scale model of spillway with jumbo and rigging at Glen Canyon Dam		T.R. 32
2—Photograph of jumbo		T.R. 32
3—Photograph of plate holding pin		T.R. 32
4—Photograph of car used for lowering workmen to jumbo		T.R. 32
5—Manual entitled "Safety Requirements for Construction by Contract", prepared by United States Department of Interior, Bureau of Reclamation, third edition, published September, 1962		T.R. 33
6—X-rays of the plaintiffs		T.R. 33
7—Pin holding anchor cable	54	99
8—Job Description of Reuben Gaulke	112	116
9—Job Description of Eugene Anderson	112	403
10—Job Description of Richard Blake	112	
11—Daily Safety Activity Report, March, 1964	123	129
12—Daily Safety Activity Report, April, 1964	123	129
13—Drawing by Norman Pedersen		257
14—"General Construction Safety Code", Industrial Commission	322	326
15—Manual of Accident Prevention in Construction	404	
Deposition of Eugene Anderson		402

DEFENDANT'S AND THIRD-PARTY PLAINTIFF'S EXHIBITS

	For Ident.	In Evidence
None		

THIRD-PARTY DEFENDANT'S EXHIBITS

	For Ident.	In Evidence
AA—Records of the Industrial Commission of the State of Arizona with respect to the claims of plaintiffs, Jack Roberson and William Rodgers		T.R. 33
BB—		
CC—Statement of Guy M. Lewis	68	69
DD—Photograph		73
EE—Photograph		73
FF—Photograph	74	75
GG—Drawing	248	250